

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

In Re: Protest of FIS Government Solutions

Protest of Intent to Award to
Xerox State and Local Solutions, Inc. for an
EBT-EFT Solution for the South Carolina
Department of Social Services, Solicitation
No. 5400006538

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE NO.: 2014-207

POSTING DATE: March 19, 2014

MAILING DATE: March 19, 2014

The South Carolina Consolidated Procurement Code (the Code) grants the right to protest to any actual bidder who is aggrieved in connection with the intended award of a contract. S.C. Code Ann. § 11-35-4210(1)(b). This solicitation is for an EBT-EFT Solution for the South Carolina Department of Social Services. FIS Government Solutions protests the intended award of a contract to Xerox State and Local Solutions, Inc. The Chief Procurement Officer held a hearing on this matter on March 12, 2014. Present at the hearing were representatives of FIS represented by Mr. Rivers S. Stilwell, Esq., Xerox represented by Mr. Michael H. Montgomery, Esq., the South Carolina Department of Social Services represented by Kathy Gettys, Esq. and the Information Technology Management Office.

Findings of Fact

Request for Proposals Published:	10/01/2013
Addendum 1 Published:	10/21/2013
Addendum 2 Published:	11/26/2013
Proposals Opened:	12/5/2013
Intent to Award Posted:	2/6/2014
Protest Received	2/14/2014
Intent to Award Suspended	2/18/2014

Background

This Request for Proposals sought the delivery of the full scope of EBT and EFT services administered by the State for the specified programs including the Supplemental Nutrition Assistance Program (SNAP) and Women, Infants, and Children (WIC). FIS alleged that the State made material miscalculations, technical errors, and logical errors in the Business Proposal scoring as follows:

- The State failed to evaluate the first year cost in accordance with the published evaluation criteria,

- The State should have evaluated WIC on a per case basis instead of a per client basis,
- The State should have evaluated the five year cost instead of the first year cost.

At the outset of the hearing, Xerox moved dismiss portions of FIS' protest as untimely, failure to state a claim for which relief can be granted, and failure to provide notice of the issues to be decided. The motion to dismiss FIS' second issue of protest that the WIC portion of the cost evaluation be based on a per case or per household basis as opposed to a per client basis is granted. The preface to Schedule 4 clearly states that bids are for "Core Services Cost Per Client Month (CPCM)." (Solicitation p.259) In addition, the state addressed this issue in response to Question 22 of Amendment 1:

Question 22: Solicitation Section Appendix S – WIC Historical Date (sic) – Participant Numbers, Page 250: The State has provided WIC Historical Date (sic) – Participant Numbers from October 2010 to April 2013. Can the State please provide the number of WIC households for the past six months of the most recent six months of data available?
State's Response: The State does not currently identify households in any reliable way.

Potential bidders were on notice that the State intended to base pricing for WIC services on a per client basis at the time the solicitation was posted and no later than the time Amendment 1 was posted. Potential bidders had the opportunity to raise this issue as a protest of the solicitation under Section 11-35-4210(1)(a) but are time barred from raising this issue as a protest of the award under Section 11-35-4210(1)(b) which states that "a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract." Motion Granted.

FIS suggests that since SNAP would be implemented in the first year and WIC is some subsequent period that the state should have evaluated the cost over five years so as to properly consider the staggered implementation of the programs. While the CPO takes judicial notice of the fact that the State opted to evaluate the cost of a contract with a potential term of seven years based on the "total cost for year one,"¹ the fact is that potential bidders were aware of this information at the time the solicitation was published and again in Amendment 1. As stated earlier, bidders are prohibited from raising an issue as a protest of the contract or award when the issue could have been raised as a protest of the solicitation. Motion Granted.

¹ The State should take into consideration Budget and Control Board Regulation **19-445.2140. B. Issuance of Specifications.**

The purpose of a specification is to serve as a basis for obtaining a supply, service, information technology, or construction item adequate and suitable for the State's needs in a cost effective manner, taking into account, to the extent practicable, the cost of ownership and operation as well as initial acquisition costs.

Discussion

FIS' remaining issue of protest is that the State failed to evaluate the Business Proposals in accordance with the published evaluation criteria. The solicitation included the following evaluation criteria for the Business Proposal:

2. Business Proposal (25 points)

Offeror shall ONLY provide cost on the Business Proposal. Offerors shall submit the total cost of the system for year one and the annual maintenance. The year one price will include the requirements for implementation and technical support as described herein.

Offeror must complete Schedules 1, 3 and 4. Schedule 2 is optional. Schedules can be found in Section IX attachments.

This evaluation criterion was further clarified in the State's response to questions 55 and 56 of Amendment One as follows:

Question 55: Solicitation Section VI, Award Criteria, Pg. 78: RFP State that "Offerors shall submit the total cost of the system for year one and the annual maintenance. The year one price will include the requirement for implementation and technical support as described herein." The price schedules are in the format of price per case month and do not ask for year by year pricing or separate pricing for annual maintenance. Please clarify that vendors are only required to complete schedules 1, 3, 4 and the optional schedule 2.
State's Response: Vendors are only required to complete schedules 1, 3, 4 and the optional schedule 2.

Question 56: Solicitation Section VI. Award Criteria, pg. 78: How many of the 25 business proposal points will be allocated to schedule 4 (WIC CPCM)?
State's Response: 15 points for SNAP; 10 points for WIC.²

The four bid schedules referenced in the evaluation criteria are forms that allow bidders to submit pricing for various services or service levels. Schedule 1 requested bidders provide pricing to core services per case per month for 27 volume bands for SNAP. Schedule 2 requested pricing for optional services. Schedule 3 requested pricing for disaster services like card production, equipment and support for retailers in an emergency. Schedule 4 requested bidders provide pricing to process core services per client per month for 11 volume bands for WIC.

² SNAP and WIC are processed with the solicited EBT functions. On page 73 of the solicitation the State describes a cash benefit transfer program as follows: "South Carolina uses consumer owned accounts for the electronic deposits of TANF benefits and other cash payments. At the discretion of the individual program, the recipients may have the option to have benefits directly deposited by the State into the recipients' own personal bank accounts. Otherwise, the Contractor will create a credit account for the recipient with a branded card to access benefits posted to the account." These functions would be covered by the solicited EFT functions or debit card functions. It should be noted that no costs for these services were included in the cost evaluation.

Amendment 1 indicated that of the 25 evaluation points allocated for the Business Proposal, up to 15 could be awarded for SNAP pricing from Schedule 1 and up to 10 points for WIC pricing from Schedule 4. At the hearing, ITMO acknowledged that it had mistakenly used the pricing found in Schedule 3 instead of Schedule 4 in determining the award. In addition, Schedule 1 included 27 volume bands covering a range from 200,000 and fewer cases per month to 500,000 and greater cases per month, in 10,000 case increments, and required bidders to enter a price to process one case per month in each volume band. In computing the bid total for each bidder, ITMO added the cost to process one case in each volume band for each of the 27 bands.³ FIS argues that adding the cost to process one case in each of 27 volume bands does not reflect the total first year cost when no more than 12 of the bands, one per month, could possibly be used. In addition, the solicitation included a chart showing the number of SNAP cases each month from January 2011 to March 2013. (Appendix B, p. 142) The number of cases fluctuated between 384,848 and 419,077 cases per month. Based on the published information no more than four bid prices would factor in the total first year cost.

Schedule 4 required bidders provide a price to process one WIC client per month for each of 11 volume bands covering a range of 80,000 and fewer clients per month to 180,000 and greater clients per month, in 10,000 client increments. In computing the total for each bidder, ITMO added the cost to process one client in each volume band for each of the 11 bands. FIS again argues that this is not representative of the first year cost. The solicitation also included a chart showing the number of participants in the WIC program each year from October 2010 to April 2013 and the number of clients fluctuated between 123,304 and 133,278 clients per month. (Appendix S, p. 255) In this case, no more than two of the volume bands would be used to compute the first year cost.

ITMO's argues that in any given month any of the volume bands could be applicable and the appropriate evaluation would be the summation of the bid prices for all volume bands. The CPO can discern no correlation between the total first year cost as defined in the solicitation and the summation of all the volume band bid prices.

³ The CPO notes that establishing a bidding schedule that does not accurately reflect the State's realistic anticipated usage and an evaluation technique that simply adds the un-weighted prices is an invitation for bidders to submit unbalanced bids by submitting an extraordinarily low price for those bands that would never be used and extraordinarily high prices for the bands most likely to be used. ITMO should consult refer to the Protest of Source Corp, CPO Case 2013-211 and Appeal to the Procurement Review Panel by Advanced Imaging, Panel Case 2013-207 for additional information on unbalanced bidding.

Determination

Section 11-35-1530(7) requires that proposals be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously. ITMO failed to evaluate Business Proposals in accordance with the Evaluation Criteria published in the solicitation as required by the Code.

FIS claims that it is the least expensive offeror and should have received the maximum points available for the Business Proposal based on an error by the State in setting WIC pricing to clients instead of cases where a case equals at least 1.5 clients. However this requested change was dismissed above as untimely and the prices submitted remain unchanged. Without this change, FIS' claim that it is less expensive than Xerox is not supported on the face of its proposal and its first requested remedy, cancellation of the award to Xerox and re-award to FIS is not appropriate.

In the alternative, FIS requested a re-scoring of the Business Proposals according to an annual methodology that reasonably reflects the criteria described in the solicitation. With the information published in Appendix B and Appendix S of the solicitation, ITMO could have chosen to properly evaluate the first year cost in one of several ways. For both SNAP and WIC, ITMO could have taken the volume for each of the latest 12 months available, multiplied it by the price bid for that volume band, added the totals together and then applied the proper weighting as follows:

SNAP Cases for Last Available 12 months - Appendix B pg 142					
		Xeros Rate	Xerox Totals	FIS Rate	FIS Totals
12-Apr	410,458	0.53	\$ 217,542.74	0.48	\$ 197,019.84
12-May	411,187	0.53	\$ 217,929.11	0.48	\$ 197,369.76
12-Jun	415,680	0.53	\$ 220,310.40	0.48	\$ 199,526.40
12-Jul	411,896	0.53	\$ 218,304.88	0.48	\$ 197,710.08
12-Aug	413,602	0.53	\$ 219,209.06	0.48	\$ 198,528.96
12-Sep	412,864	0.53	\$ 218,817.92	0.48	\$ 198,174.72
12-Oct	415,139	0.53	\$ 220,023.67	0.48	\$ 199,266.72
12-Nov	417,283	0.53	\$ 221,159.99	0.48	\$ 200,295.84
12-Dec	417,289	0.53	\$ 221,163.17	0.48	\$ 200,298.72
13-Jan	418,348	0.53	\$ 221,724.44	0.48	\$ 200,807.04
13-Feb	417,380	0.53	\$ 221,211.40	0.48	\$ 200,342.40
13-Mar	419,077	0.53	\$ 222,110.81	0.48	\$ 201,156.96
Cost for 12 months			\$ 2,639,507.59		\$ 2,390,497.44
Of 15 Points Available			13.58		15

WIC Participants for Last 12 Months - Appendix S					
		Xeros Rate	Xerox Totals	FIS Rate	FIS Totals
May-12	129,453	0.73	\$ 94,500.69	1.06	\$ 137,220.18
Jun-12	130,019	0.73	\$ 94,913.87	1.05	\$ 136,519.95
Jul-12	129,951	0.73	\$ 94,864.23	1.06	\$ 137,748.06
Aug-12	131,681	0.73	\$ 96,127.13	1.05	\$ 138,265.05
Sep-12	130,140	0.73	\$ 95,002.20	1.05	\$ 136,647.00
Oct-12	130,522	0.73	\$ 95,281.06	1.05	\$ 137,048.10
Nov-12	128,751	0.73	\$ 93,988.23	1.06	\$ 136,476.06
Dec-12	125,225	0.73	\$ 91,414.25	1.06	\$ 132,738.50
Jan-13	126,784	0.73	\$ 92,552.32	1.06	\$ 134,391.04
Feb-13	124,562	0.73	\$ 90,930.26	1.06	\$ 132,035.72
Mar-13	123,428	0.73	\$ 90,102.44	1.06	\$ 130,833.68
Apr-13	123,304	0.73	\$ 90,011.92	1.06	\$ 130,702.24
			\$1,119,688.60		\$1,620,625.58
Of 10 Points Available			10		6.91

As a result, Xerox would receive 23.58 points and FIS would receive 21.91 points.

ITMO also could have averaged the usage for the last 12 months of available data, multiplied that by the price for the averaged volume times 12 and applied the proper weighting:

				Xerox Rate	Xerox Total	FIS Rate	FIS Total
Average SNAP Cases Last Available 12 months	415017			0.53	\$219,959.01	0.48	\$199,208.16
Average WIC Participants Last Available 12 months	127818			0.73	\$ 93,307.14	1.06	\$135,487.08
SNAP Points					13.58		15.00
WIC Points					10.00		6.89
Total Business Proposal Points					23.58		21.89

In this case, Xerox would have received 23.58 points and FIS 21.89.

ITMO could also have averaged the usage for all the months shown, multiplied that by the cost for that volume band and applied the proper weight:

				Xerox Rate	Xerox Total	FIS Rate	FIS Total
Average SNAP Cases	391285			0.54	\$211,293.90	0.49	\$191,729.65
Average WIC Participants	133692			0.73	\$ 97,595.16	1.05	\$140,376.60
SNAP Points					13.61		15.00
WIC Points					10.00		6.95
Total Business Proposal Points					23.61		21.95

In this case Xerox would have received 23.61 points and FIS 21.95 points.

After rescoring the Business proposals using three approaches to determine the first year cost, FIS' score only improved one one-hundredth of a point and Xerox remained the highest ranked offeror.⁴

In similar circumstances the Panel has declined to disturb an award. For example, the Panel has denied a claim of arbitrary evaluation because the protestant's standing would not have changed:

The Panel does not believe that a lack of consensus on scoring indicates arbitrariness in this case. The CPO in his order demonstrates that there is very little difference between the final score of proposals as assigned under DHEC's method in this case and the final score as it would have been if all four scores had been used....In either case, CASA's proposal ranked third from the bottom.

Appeal by Tri-County Citizens Against Sexual Assault, Panel Case No. 1989-24.

In *Appeal by Today's Business Systems*, Panel Case No. 1994-2, the Panel noted that regardless of the merits of the protest, the appropriate remedy would not be to change the award: "Even if Systems proves all of the allegations of its protest letter, it has not raised issues which would result in the contract being awarded to it under the Procurement Code." And in *Appeal by First Sun EAP Alliance, Inc.*, Panel Case No. 1994-11, the Panel refused to disturb an award based on a claim of bias that would not have changed the outcome:

[T]he Panel does not need to determine the issue of Dr. Raymond's alleged bias, because with or without bias, the outcome of the award is not effected [*sic*]. Nor has First Sun shown that Dr. Raymond's alleged bias in any way effected [*sic*] the scores of the other evaluators. Even if Dr. Raymond is biased, his scores do not make a difference in the outcome of the award. If Dr. Raymond's scores are removed from the totals, Family Service still has a higher total score than First Sun....If an evaluator's score is erroneous, arbitrary, capricious or even biased, but it does not effect [*sic*] the outcome of the award, than it may not effect [*sic*] the finality of the award.

Most recently the Panel agreed with the CPO's finding of arbitrary conduct, but treated it as harmless error:

[T]he Panel agrees with the CPO's finding that the conduct of the evaluators was arbitrary and capricious. However, the Panel also finds that PCG failed to show that this defect

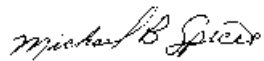
⁴ If any of these approaches could have changed the scoring such that the award would be tipped to FIS, the CPO would be compelled to cancel the award and order a resolicitation. Counsel for FIS conceded at the hearing that the only issue that would change the result was evaluating the WIC component on a "per household" vice "per client" basis. For the reasons above, that portion of FIS' protest was dismissed.

affected the outcome of the procurement, making it harmless error and not a basis for ordering relief.

Appeal by Excent Corporation, Panel Case No. 2013-2.

Because ITMO's failure to evaluate Business Proposals in accordance with the Evaluation Criteria published in the solicitation would not have affected the outcome, it is harmless error. The award to Xerox is reinstated.

For the Information Technology Management Office

A handwritten signature in black ink, appearing to read "Michael B. Spicer". The signature is written in a cursive, flowing style.

Michael B. Spicer
Chief Procurement Officer

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 2013)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 108.1 of the 2013 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

-
1. What is your/your company's monthly income? _____
 2. What are your/your company's monthly expenses? _____
 3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this
_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.